In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 952

J. H. RUTTER-REX MANUFACTURING COMPANY, INC.,
CROSS-PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL–CIO

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The National Labor Relations Board's petition for a writ of certiorari in *National Labor Relations Board* v. *J. H. Rutter-Rex Manufacturing Co., Inc.*, No. 925, this Term, asks this Court to review the action of the United States Court of Appeals for the Fifth Circuit reducing the Board's award of backpay to employees who struck as a result of the Company's unfair labor practices. To justify the reduction, that court relied on alleged "inordinate delay" by the Board in processing the backpay claims. The Company's cross-petition seeks to nullify the Board's

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backpay award in its entirety. For the reasons set forth below, the cross-petition should be denied.

1. As shown in the petition in No. 925 (pp. 2–3, 25a), the Board found in February 1956 that the Company had unlawfully refused to bargain with the certified representative of its employees, the Amalgamated Clothing Workers, and that an ensuing strike had been caused by this unfair labor practice. Accepting the recommendation of its Trial Examiner, the Board ordered the Company, *inter alia,* "[u]pon application, [to] offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went out on strike," with an employee's eligibility for backpay to commence five days after his application for reinstatement. By the time the Trial Examiner had made his recommendations and the Board had issued its decision and order, the strike had been terminated by the Union and all the employees whose backpay claims are at issue had already applied for reinstatement. The Company contends that the Board order merely obligated it to reinstate the strikers and to pay them backpay in the event they applied for reinstatement *after* the Board's order issued; since the applications here were made *before* issuance of the Board's order, no obligation arose.

As the Board pointed out (Pet. in No. 925, pp. 9–10, 48a–50a), however, the Act imposes upon an employer the obligation to reemploy unfair labor practice strikers whenever they apply to return to work, even if it is necessary to discharge replacements who have been hired for them; it is the fact of an unfair labor prac-

tice strike, not the Board's order as such, which gives rise to the reinstatement obligation. See *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278, *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 597–598 (C.A. 5). Accordingly, the Company was on notice, even before the Board issued its order, that its failure to reinstate all strikers upon their application created a risk that it would be required to give them backpay from that date should the Board ultimately find the strike to have been caused or prolonged by the Company's unfair labor practices. In these circumstances, the court below reasonably concluded (Pet. in No. 925, p. 11a) that the reference in the order to reinstatement upon application covered, not only future applications by the strikers, but also any applications that may already have been filed.[1]

2. In four letters written to the Company between April 5 and May 13, 1955, the Union made unconditional application for reinstatement of approximately 159 named strikers (Pet. in No. 925, pp. 83a–85a; R. 172–175; 1085–1091, Vol. X 160–165, 168–172). The Company responded by suggesting that strikers desiring to return to work make application to its personnel office in groups of 20 per day (Pet. in No. 925, p. 84a; R. 173–174; 1088, Vol. X 167). The Union replied that it would have the strikers report to the personnel office in the manner thus requested, but

[1] The Company does not challenge "the Board's power to have issued a retroactive order under the circumstances of this case" (Cross-pet. 9, n. 1). It merely argues that the order here was not retroactive.

that it considered the employees "as having unconditionally applied for employment on the date you received our registered letters along with the list of names attached thereto" (Pet. in No. 925, pp. 85a–86a; R. 176; 1090, Vol. X 168). The Company contends (Cross-pet. 13–16) that by agreeing to let the strikers report in groups of 20 a day, the Union qualified its original blanket requests and thereby made it necessary for the General Counsel of the Board to prove that any employee who did not come to the personnel office in the requested manner was available for work. The Board found that the Union had not qualified its valid and unconditional applications for reinstatement; the court of appeals sustained that finding (Pet. in No. 925, pp. 88a–89a, 10a). The issue turns on the facts of this particular case, and does not warrant further review.[2] In any event, since the Union explicitly stated in its April 22 letter that it was *not* abandoning its earlier blanket applications for reinstatement, the Board's conclusion is fully justified.

3. Finally, the Company contends (Cross-pet. 16–20) that it should be relieved of its entire liability because the Board failed to notify it promptly of what steps it had to take in order to comply with the Board's order. Thus, the Company notes that on November 7, 1957, it asked the Board's regional office

[2] Since it appears that only 8 of the 161 employees who receive backpay under the decision of the court below did not make a personal application for reinstatement (R. 172–180, 242–246, 938–939), the Company's argument, if valid, would at most affect these eight employees.

to advise it "if any instance of a failure to comply with the order is brought to your attention" (R. 957), but it heard nothing until March 1960, when that office requested certain data (R. 958). But, as the court of appeals recognized, "the Company could not shift or avoid its duty of compliance by asking the Board to notify it of any failures of compliance which might be brought to its attention" (Pet. in No. 925, p. 14a). Accordingly, the only question that warrants review is whether the court of appeals properly concluded that there was "inordinate delay" on the part of the Board, and that such delay justified a reduction in the Company's back pay liability; that issue is adequately presented in the Board's petition in No. 925.

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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